

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

STEPHEN JAMES YASTER,

Defendant-Appellant.

UNPUBLISHED

July 17, 2001

No. 216881

Grand Traverse Circuit Court

LC No. 98-007559-FH

Before: Collins, P.J., and Hoekstra and Gage, JJ.

PER CURIAM.

After a jury trial, defendant was convicted of third-degree criminal sexual conduct, MCL 750.520d(1)(a) (penetration involving a person between thirteen and sixteen years of age). The trial court sentenced defendant to six to fifteen years' imprisonment. Defendant appeals as of right. We affirm.

Defendant first contends that the trial court erred in admitting evidence of other sexual contact between himself and the victim because the prosecutor did not comply with the trial court's pretrial order provision regarding notice of such evidence, and the evidence was introduced to prove defendant's bad character and resulted in unfair prejudice. We review for a clear abuse of discretion the trial court's decision to admit or exclude evidence. *People v Starr*, 457 Mich 490, 494; 577 NW2d 673 (1998).

Defendant initially suggests that the trial court violated the law of the case doctrine by failing to enforce the prosecutor's compliance with the court's pretrial scheduling order's notice provision, which required the prosecutor to give notice of his intent to use similar acts evidence no fewer than fourteen days before the final conference.¹ We note, however, that the law of the case doctrine has no application in the context of defendant's trial. See *People v Wells*, 103 Mich App 455, 462; 303 NW2d 226 (1981) (explaining that the doctrine provides that an inferior court is bound by the rulings of a superior court, and that decisions made on an initial appeal are not open to review on subsequent appeals). Defendant cites no authority for the proposition that

¹ The prosecutor indicated his intent to use evidence of other sexual contact in his pretrial brief, filed nearly one month after the final conference.

once a trial court issues a scheduling order it thereafter remains bound by the order. Because (i) the prosecutor approximately two months before trial provided defendant reasonable notice of his intent to introduce the evidence of other sexual contacts, MRE 404(b)(2), and (ii) defendant had awareness of the victim's allegations of other sexual contacts at least since his preliminary examination, which occurred on March 5, 1998, more than seven months before his trial, we cannot conclude that the trial court abused its discretion in admitting the victim's testimony of other sexual contacts between herself and defendant over defendant's lack of proper notice objection. *Starr, supra*.

Defendant further asserts that the evidence of other sexual contacts impermissibly tended to establish his bad character, and that consequently the court's admission of this evidence was inappropriate because it posed a very high risk of unfair prejudice. Other acts evidence tending to reveal a defendant's character generally may be admitted as long as it is introduced for a proper purpose, such as to show an opportunity, scheme, plan or system in doing an act. MRE 404(b)(1); *Starr, supra* at 496-497. A trial court has discretion to admit evidence of other acts of sexual intimacy between a defendant and his minor victim because beyond merely showing the defendant's character, the other acts have the proper purpose and are probative of helping to explain an otherwise incredible charge. *People v DerMartex*, 390 Mich 410, 413-414; 213 NW2d 97 (1973). Evidence of additional acts of sexual intimacy is intended to corroborate other evidence, including the victim's testimony, not merely to show that the defendant must be guilty of the charged offense because he is a bad person. *People v Jones*, 417 Mich 285, 285-287; 335 NW2d 465 (1983); *DerMartex, supra* at 413. A trial court nonetheless should exclude relevant evidence, however, if the danger of unfair prejudice to the defendant substantially outweighs the evidence's probative value. MRE 403.

In the instant case, the victim testified to several occurrences of sexual contact by defendant similar to the charged incident.² Although the specific manners of penetration sometimes varied from incident to incident, the victim's testimony reflected that before each penetration defendant provided the victim alcohol and got her intoxicated. The incidents generally occurred later during the evening or early morning hours, after the victim's mother and siblings were asleep, either inside or in close proximity to the family's home. This evidence of similar acts involving the complainant and defendant tended to make more probable the truth of the victim's allegations regarding the act charged, a proper noncharacter ground for admission. *DerMartex, supra* at 414-415. The victim's testimony about similar acts corroborates her testimony of the charged acts because it tends to explain what might otherwise appear improbable and rebuts "the incredibility inherent in a seemingly isolated act of sexual misconduct within a household." *People v Dreyer*, 177 Mich App 735, 738; 442 NW2d 764 (1989).

² The charged incident occurred in approximately May or June 1997. The incident occurred in a park adjacent to the trailer home the victim and defendant, her stepfather, shared with the victim's mother and brother, and the victim's half siblings. After defendant provided the victim alcohol and the victim became intoxicated, defendant laid her down on a picnic table, placed his finger inside her vagina, then orally penetrated the victim's vagina. Subsequently, defendant requested that the victim perform oral sex for him, then placed his penis inside her mouth.

With respect to potential prejudice to defendant arising from the victim's testimony regarding other acts of sexual contact, the trial court acknowledged that any evidence tending to prove the truth of the victim's allegations naturally would be prejudicial to defendant, but not unfairly so. The court reasoned that the risk of prejudice to defendant was not measurably greater by the admission of similar acts evidence, when the occurrence of a single act as alleged by the victim, if proven, itself constituted an allegation of "outrageous and unforgiveable [sic] behavior." In light of the significant probative value of the victim's testimony regarding other instances of sexual intimacy with defendant, we cannot conclude that the trial court abused its discretion in finding no undue prejudice to defendant and admitting this testimony. MRE 403, 404(b); *DerMartzex, supra* at 413 ("[T]he probative value outweighs the disadvantage where the crime charged is a sexual offense and the other acts tend to show similar familiarity between the defendant and the person with whom he allegedly committed the charged offense.").³

We will not consider defendant's next assertion of error, that the trial court improperly permitted the prosecutor to question a friend of the victim regarding defendant's initiation of sexual contact with her, because defense counsel first elicited this information during his cross examination of the witness.⁴ *People v Griffin*, 235 Mich App 27, 46; 597 NW2d 176 (1999) ("[E]rror requiring reversal cannot be error to which the aggrieved party contributed by plan or negligence.").

Defendant lastly claims that the trial court's refusal to admit a proffered letter denied him his Sixth Amendment right to confrontation. The letter was handwritten, undated, addressed to "Mo," and signed with a heart symbol followed by "Me." Defendant suggested that the letter, which the victim's mother assertedly found in the family's laundry room, was addressed to the victim and that one paragraph of the letter reflected that the victim had discussed with the letter's author a plan to get defendant out of the household by making up the sexual abuse allegations against him. The letter did not specifically mention any allegations of sexual abuse of the victim by defendant, but indicated, "You must really want him out," wondered whether "you think your mom will believe you?," and warned, "You better make sure you keep your story straight."

"[T]he Sixth Amendment right to confrontation requires only that the defendant be permitted to introduce relevant and admissible evidence." *People v Hackett*, 421 Mich 338, 354; 365 NW2d 120 (1984). We cannot conclude that the trial court abused its discretion in refusing to admit the letter, however, because even after eleven witnesses testified regarding the extent of their knowledge of the letter's origins, the letter remained unauthenticated. MRE 901; *People v Martin*, 150 Mich App 630, 637; 389 NW2d 713 (1986). The victim did not recall receiving the

³ We further note that the trial court properly instructed the jury that it could not utilize the evidence of uncharged sexual contacts to support a conclusion that defendant was a bad person who was likely to commit such crimes, but that the evidence was to be used to evaluate the truthfulness and credibility of the victim's account of the crime for which defendant was charged. *Starr, supra* at 496, 498.

⁴ We also note that defendant failed to object at trial to the prosecutor's follow up questions to the witness concerning the sexual contact between herself and defendant.

letter and its author was never discerned.⁵ Moreover, the letter was not discovered in the same location or at the same time as hundreds of other letters to and from the victim, but later and in a different location by defendant and his wife, who disbelieved her daughter's allegations against defendant. Despite defendant's ample opportunity to demonstrate that the letter was what he claimed it to be, "a condition precedent to admissibility," MRE 901(a), he failed to do so. Accordingly, we find that the trial court properly excluded the unauthenticated letter, and we find no Sixth Amendment violation.⁶

Affirmed.

/s/ Jeffrey G. Collins

/s/ Joel P. Hoekstra

/s/ Hilda R. Gage

⁵ Testimony at the hearing indicated that more than one of the victim's friends occasionally signed letters with the heart symbol followed by "Me." Defendant questioned several of the victim's classmates about the letter, and not one admitted recognizing it as their own or that of someone else known to them.

⁶ We further note that defendant was not deprived his right to cross examine witnesses regarding his theory of fabrication. Defense counsel inquired of the victim whether she had spoken to her friends about getting defendant out of the house. Defense counsel also questioned one of the victim's friends extensively about whether she and the victim had plotted to get defendant out of the victim's house by falsely reporting the sexual abuse allegations. The jury had the opportunity to observe the witnesses' demeanors as they denied any scheme to remove defendant from the home. Defendant's offer of proof with respect to the letter's netted no appreciable difference in testimony.